

People v Moore

2007 NY Slip Op 31575(U)

June 4, 2007

Supreme Court, Kings County

Docket Number: 0007190/1996

Judge: Jill Konviser

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 26**

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THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

Ind. No. 7190/96

ARTHUR MOORE, :

Defendant. :

----- X

JILL KONVISER, JUSTICE:

On or about or between April 19, 1996 and May 19, 1996, the defendant placed his penis inside the mouth and vagina of his four year old daughter. On May 27, 1997, the defendant was convicted, after a non-jury trial before a now retired judge, of rape in the first degree, sexual abuse in the first degree, incest and endangering the welfare of a child. On June 9, 1997, the defendant was sentenced to concurrent indeterminate prison terms of twelve and one-half to twenty-five years on the rape count, three and one-half to seven years on the sexual abuse count, two to four years on the incest count¹ and one year on the endangering the welfare of a child count. The defendant has filed a pro se motion to vacate the judgement of conviction pursuant to Criminal Procedure Law §440.10. For the reasons that follow, the motion to vacate the judgment of conviction is denied.

A. Procedural History

The defendant filed his first pro se motion to vacate the judgment of conviction under C.P.L. §440.10 on or about September 16, 1998. In that motion he contended that trial counsel was ineffective for failing to introduce certain unspecified "DNA medical records" into evidence at trial. The trial judge, in a decision dated February 3, 1999, denied the defendant's motion on the ground

¹The Appellate Division reduced the sentence on the incest count from two to four years to one and one-third to four years. People v. Moore, 263 A.D.2d 517, 518 (2d Dept.), lv. denied, 94 N.Y.2d 799 (1999).

that he failed to set forth sufficient allegations in his moving papers to establish the existence of any such alleged “DNA medical records.” February 3, 1999 Decision at 2.² Further, the Court held that even if such records had existed “the failure to introduce them would have been a tactical decision and not a denial of meaningful representation.” Id.

The defendant later filed a direct appeal of his conviction with the Appellate Division, Second Department, in which he alleged: (1) that he had received an illegal sentence and that the sentences imposed were “unduly severe;” (2) the trial court erred when it permitted a child witness to testify; (3) the “conviction was against the weight of the credible evidence and unsupported by legally sufficient evidence;” (4) the trial court erred when it permitted him “to waive a jury trial;” and, (5) error had occurred because two of the six counts on which he was tried and eventually acquitted after trial (sexual abuse in the first degree under count four in the indictment and incest under count six in the indictment) had been dismissed by a prior judge before the start of trial.”³

On June 19, 1999, the Appellate Division, Second Department, unanimously affirmed the defendant’s conviction. People v. Moore, 263 A.D.2d 517 (2d Dept. 1999). The Court held: (1) the defendant’s challenge to the legal sufficiency of the evidence was unpreserved and, in any event, without merit as the trial evidence was legally sufficient to prove the defendant’s guilt beyond a reasonable doubt; (2) the verdict was not against the weight of the evidence; and, (3) the defendant knowingly and intelligently waived his right to a jury trial. Although the Appellate Division

²A copy of this decision is attached to the People’s Affirmation in Opposition as part of Exhibit A.

³The defendant, however, was convicted after trial of rape in the first degree, sexual abuse in the first degree, incest and endangering the welfare of a child. A copy of the point headings included in the defendant’s Appellate Division Brief, as well as the entirety of point five in which the defendant claimed that he was improperly tried on two counts that had been dismissed prior to trial, is attached to the People’s Affirmation in Opposition as Exhibit B.

reduced the sentence imposed on the incest conviction from two to four years to one and one-third to four years, it found that the remaining sentences imposed were “neither harsh nor excessive.” *Id.* at 518. In addition, while the Appellate Division did not specifically discuss the defendant’s claims that he had been tried on two counts in the indictment that had been dismissed prior to trial (he was acquitted of both counts after trial) and that a child witness improperly testified at trial, it ruled that the “defendant’s remaining contentions are without merit.” *Id.* Leave to appeal to the New York Court of Appeals was denied on October 1, 1999. People v. Moore, 94 N.Y.2d 799 (1999) (Kaye, C. J.).

On or about July 3, 2001, the defendant filed what the trial judge deemed to be a pro se motion to reargue the denial of his first motion to vacate the judgment of conviction pursuant to C.P.L. §440.10. In his motion to reargue, the defendant provided the court with two copies of medical reports indicating that he had tested positive for syphilis and claimed that counsel was ineffective for failing to introduce those records into evidence at trial. In a decision dated September 24, 2001, the defendant’s motion to vacate the judgment was denied on the ground that: (1) the reports in question were not generated until after the trial had been completed and, thus, could not have been introduced into evidence at trial; (2) the defendant failed to submit proof “indicating that he had syphilis at the time of the offenses;” and, (3) even if the defendant could prove that he had syphilis at the time the offenses were committed, counsel would not have been ineffective for failing to introduce such proof into evidence as it would have been insufficient to disprove the charges of rape and incest. Decision of September 24, 2001 at 3,4.³

³A copy of this decision is attached to the People Affirmation in Opposition as part of Exhibit A.

The defendant filed his second pro se motion to vacate the judgment of conviction on or about June 2002. In that motion the defendant claimed: (1) that he did not knowingly and intelligently waive his right to a jury trial; (2) the sentence imposed on the crimes for which he was convicted was cruel and unusual; (3) that the grand jury proceedings were defective and the evidence before the grand jury was insufficient; and, (4) blood test evidence was improperly admitted at trial due to the failure to establish a proper chain of custody for such evidence.

In a decision dated September 2, 2002, the defendant's second motion to vacate the judgment of conviction was denied in its entirety. The court ruled that the defendant's first two claims were mandatorily barred from consideration by C.P.L. §440.10(2)(a) as they were raised on direct appeal and denied on the merits by the Appellate Division. With respect to the third and fourth claims raised by the defendant, the Court held, inter alia, that such claims were barred by C.P.L. §440.10(2)(c) as they could have been raised by the defendant on direct appeal.

On December 27, 2005, the Appellate Division unanimously denied his petition for a writ of error coram nobis, which challenged the effectiveness of appellate counsel. People v. Moore, 24 A.D.3d 800 (2d Dept. 2005).

B. The Motion Before the Court

The defendant, in his third pro se motion to vacate the judgment of conviction pursuant to C.P.L. §440.10, claims that the judgment should be vacated since two of the counts on which he was tried, sexual abuse in the first degree (count four in the indictment) and incest (count six in the indictment), had been dismissed prior to trial by another judge. The record shows that the defendant was acquitted of the two counts that had previously been dismissed, but was convicted of four other counts: (1) rape in the first degree; (2) sexual abuse in the first degree; (3) incest; and, (4)

endangering the welfare of a child. For the reasons that follow, the defendant's motion to vacate the judgment of conviction is denied.

The defendant's motion is mandatorily barred from this Court's consideration by C.P.L. §440.10(2)(a). C.P.L. §440.10(2)(a) provides: "the court must deny a motion to vacate a judgment when . . . [t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment." In this case, the defendant raised the claim now before the Court on direct appeal and it was found to be without merit by the Appellate Division. See People v. Moore, 263 A.D.2d at 518, As such, his motion to vacate the judgment is denied.

Moreover, to the extent that the defendant has reconfigured his claim with respect to the dismissed charges as one raising jurisdictional issues, thus making it arguably different from the claim raised on direct appeal, the motion to vacate the judgment on this ground must still be denied as it could have been raised on direct appeal to the Appellate Division. C.P.L. §440.10(2)(c) provides that a court must deny a defendant's motion to vacate the judgment of conviction when sufficient facts appear on the record to permit appellate review of the issue raised, but the defendant unjustifiably failed to raise the issue on direct appeal to the Appellate Division. People v. Cochrane, 27 A.D.3d 659 (2d Dept.), lv. denied, 7 N.Y.3d 787, cert. denied, 127 S. Ct. 436 (2006); People v. Jossiah, 2 A.D.3d 877 (2d Dept. 2003), lv. denied, 2 N.Y.3d 742 (2004); see People v. Cooks, 67 N.Y.2d 100, 103 (1986) (a motion to vacate a judgment of conviction cannot be "employed as a substitute for direct appeal when defendant. . . could readily have raised it on appeal but failed to do so (C.P.L. §440.10[2][c]).").

In this case, the fact that the defendant was tried on several counts, two of which had been earlier dismissed, was part of the record on appeal. Thus, any claims raised in connection with such

circumstances could have been raised on direct appeal. The defendant, however, unjustifiably failed to raise such claim on direct appeal. As such, the motion to vacate the judgment on this ground is mandatorily barred by C.P.L. §440.10(2)(c). People v. Byrdsong, 234 A.D.2d 468 (2d Dept. 1996), lv. denied, 89 N.Y.2d 1033 (1997).

In addition, any claim arising out of having been tried on two counts that were dismissed prior to trial, and for which he was ultimately acquitted after trial, is also barred by C.P.L. §440.10(3)(c) as the defendant failed to raise this claim in his two earlier motions to vacate the judgment of conviction. Under C.P.L. §440.10(3)(c) a court may deny a motion to vacate the judgment when the defendant has filed a previous motion to vacate the judgment pursuant to C.P.L. §440.10 and “was in a position adequately to raise the ground or issue underlying the present motion but did not do so.” In this case, the defendant filed two earlier pro se motions to vacate the judgment of conviction that were respectively denied on February 3, 1999 and September 2, 2002. The defendant’s current claims are based entirely on circumstances that occurred before either of those pro se motions were filed. Therefore, he was able to raise his current claim in his earlier motions. As such, it is barred from this Court’s consideration by C.P.L. §440.10(3)(c).

Conclusion

The motion to vacate the judgment of conviction pursuant to C.P.L. §440.10 is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York
June 4, 2007

